Export-Import Bank of Malaysia Bhd v Impiana Seminyak (Labuan) Co Ltd & Anor

HIGH COURT (KUALA LUMPUR) — SUIT NO WA-22M-18–01 OF 2022
YUSRIN FAIDZ JC
3 FEBRUARY 2025

Banking — Banks and banking business — Islamic financing facility — Plaintiff granted facility to first defendant and second defendant as guarantor entered corporate guarantee and indemnity agreement — Plaintiff claimed for recovery of outstanding sums after breach of terms of facility agreement by defendants — Whether defendants were liable to plaintiff — Whether damages in terms of outstanding principal amount, profit charges, and ta'widh ought to be awarded to plaintiff

Vide a letter of offer, Export-Import Bank of Malaysia Bhd ('the plaintiff') granted the first defendant ie Impiana Seminyak (Labuan) Co Ltd ('D1') an islamic financing facility under the Overseas Investment Financing-i ('OIF-I') facility. The purpose of the facility was to part-finance the acquisition, renovation, and refurbishment of villas in Bali, Indonesia and for general working capital. The facility agreement was executed, and the second defendant ie Impiana Sdn Bhd ('D2'), as the guarantor, entered into a corporate guarantee and indemnity agreement. The facility which was based on the *Tawarruq* (Commodity Murabahah) concept was fully disbursed by February 2018. In 2020, due to the COVID-19 pandemic, D1 requested a moratorium on the repayment of the facility. The plaintiff granted the moratorium through supplementary letters of offer ('SLO1' and 'SLO2'), which deferred the payment of principal and profit for a specified period. However, SLO1 and SLO2 also imposed additional conditions, including the requirement for D1 to maintain a financial service reserve account ('FSRA'), execute additional security documents, and maintain insurance coverage over the project. D1 failed to comply with these conditions. As a result, the plaintiff issued a notice to remedy demanding that D1 remedy the breaches within 30 days. When D1 failed to do so, the plaintiff issued a notice of recall and termination terminating the facility and demanding payment of the outstanding sum of USD3,590,213.17. Thereafter, the plaintiff commenced legal proceedings against the defendants for the recovery of outstanding sums. The plaintiff claimed that the defendants breached the terms of the facility agreement and that the sum of USD3,590,213.17 was due and payable together with late payment compensation (*ta'widh*) and costs. The defendants contended that the plaintiff's claim was premature due to an alleged moratorium granted by the plaintiff and further argued that the penalty

chargers imposed by the plaintiff were exorbitant and unreasonable. A

Held, allowing the claim:

(1) The moratorium granted under SLO1 and SLO2 was expressly limited to the deferral of payments in respect of principal and profit. It did not, however, operate to suspend D1's obligations under the FSRA, nor did it absolve D1 from executing the additional security documents or maintaining insurance coverage. D1 was fully aware of its obligations under SLO1 and SLO2. No written variation to the relevant obligations was ever issued. Furthermore, the plaintiff had consistently and unequivocally demanded compliance with the FSRA requirements. The defendants' assertion that they were engaged in negotiations for a waiver remained a mere exchange of discussions, which in law did not crystallise into a binding agreement capable of altering their contractual obligations. As to the liability of D2 as the corporate guarantor, the restructuring terms in SLO1 and SLO2 had been consented by D2 which was evidenced by D2's signatures on both documents. Therefore, by virtue of ss 86 and 88 of the Contracts Act 1950, such consent bound D2 to the terms of SLO1 and SLO2. D2 could not be permitted to adopt inconsistent positions. Moreover, under the corporate guarantee and indemnity agreement, D2 assumed obligations that surpassed those of a mere surety, effectively taking on the role of a principal debtor. Therefore, the plaintiff had sufficiently established the liability of both D1 and D2 (see paras 22–23, 26, 29–30 & 34). B C D E F

(2) The agreements were unequivocal with respect to the charges to be imposed. D1 was afforded ample opportunity to scrutinise the terms of the agreements or to seek independent legal or Shariah counsel, as they had expressly warranted under cl 60 of the facility agreement. It was wholly untenable for D1, having fully utilised the financing, derived substantial benefits therefrom, and further enjoyed the restructuring arrangement facilitated by SLO1 and SLO2, to now challenge the validity of the very agreements that granted them these advantages. The facility agreement contained conclusive evidence clause and the defendants had failed to identify any glaring, plain, or obvious error in the certificate. The wording of cl 1.1 of the facility agreement made it unequivocally clear that the plaintiff was under no obligation to inform the defendant of the specific Islamic Cost of Funds (COF-i) which was being applied. Thus, the defendants had failed to demonstrate any manifest error within the certificate of indebtedness. Consequently, the quantum of the claim stood as conclusive, and the plaintiff was rightfully entitled to recover the outstanding sum as set forth in their pleadings (see paras 38, 43, 46, 56 & 59–60). G H I

[Bahasa Malaysia summary

Melalui satu surat tawaran, Export-Import Bank of Malaysia Bhd ('plaintif') memberikan defendan pertama iaitu Impiana Seminyak (Labuan) Co Ltd ('D1') kemudahan pembiayaan Islam di bawah kemudahan Overseas Investment Financing-i ('OIF-I'). Tujuan kemudahan itu adalah untuk membiayai sebahagian pemerolehan, pengubahsuaian, dan pembaikan vila di Bali, Indonesia dan untuk modal kerja am. Perjanjian kemudahan itu dilaksanakan, dan defendan kedua iaitu Impiana Sdn Bhd ('D2'), sebagai penjamin, memasuki perjanjian jaminan korporat dan indemniti. Kemudahan yang berdasarkan konsep Tawarruq (Komoditi Murabahah) telah dibayar sepenuhnya pada Februari 2018. Pada tahun 2020, disebabkan oleh pandemik COVID-19, D1 memohon moratorium ke atas pembayaran balik kemudahan tersebut. Plaintif memberikan moratorium melalui surat tawaran tambahan ('SLO1' dan 'SLO2'), yang menangguhkan pembayaran prinsipal dan keuntungan untuk tempoh yang ditetapkan. Walau bagaimanapun, SLO1 dan SLO2 juga mengenakan syarat tambahan, termasuk keperluan untuk D1 mengekalkan akaun rizab perkhidmatan kewangan ('FSRA'), melaksanakan dokumen keselamatan tambahan, dan mengekalkan perlindungan insurans ke atas projek tersebut. D1 gagal mematuhi syarat-syarat ini. Akibatnya, plaintif mengeluarkan notis untuk remedi yang menuntut agar D1 memulihkan pelanggaran dalam tempoh 30 hari. Apabila D1 gagal berbuat demikian, plaintif mengeluarkan notis pembatalan dan penamatan yang menamatkan kemudahan itu dan menuntut pembayaran jumlah tertunggak sebanyak USD3,590,213.17. Selepas itu, plaintif memulakan prosiding undang-undang terhadap defendan untuk mendapatkan semula jumlah tertunggak. Plaintif mendakwa bahawa defendan telah melanggar syarat-syarat perjanjian kemudahan dan bahawa jumlah sebanyak USD3,590,213.17 adalah terhutang dan perlu dibayar bersama-sama dengan pampasan pembayaran lewat (*ta'widh*) dan kos. Defendan berhujah bahawa tuntutan plaintif adalah pramatang disebabkan oleh moratorium yang didakwa diberikan oleh plaintif dan selanjutnya berhujah bahawa caj penalti yang dikenakan oleh plaintif adalah terlalu tinggi dan tidak munasabah.

Diputuskan, membenarkan tuntutan:

(1) Moratorium yang diberikan di bawah SLO1 dan SLO2 adalah terhad secara nyata kepada penangguhan pembayaran berhubung dengan prinsipal dan keuntungan. Walau bagaimanapun, ia tidak beroperasi untuk menggantungkan obligasi D1 di bawah FSRA, dan juga tidak melepaskan D1 daripada melaksanakan dokumen keselamatan tambahan atau mengekalkan perlindungan insurans. D1 sedar sepenuhnya tentang obligasinya di bawah SLO1 dan SLO2. Tiada perubahan bertulis kepada obligasi yang relevan pernah dikeluarkan. Tambahan pula, plaintif telah secara konsisten dan tidak berbelah bahagi

menuntut pematuhan kepada keperluan FSRA. Dakwaan defendan bahawa mereka terlibat dalam perundingan untuk penepian kekal sebagai pertukaran perbincangan semata-mata, yang dari segi undang-undang tidak menjelmakan perjanjian mengikat yang mampu mengubah obligasi kontrak mereka. Berhubung dengan liabiliti D2 sebagai penjamin korporat, syarat penstrukturan semula dalam SLO1 dan SLO2 telah dipersetujui oleh D2 yang dibuktikan dengan tandatangan D2 pada kedua-dua dokumen tersebut. Oleh itu, berdasarkan ss 86 dan 88 Akta Kontrak 1950, persetujuan sedemikian mengikat D2 kepada terma SLO1 dan SLO2. D2 tidak boleh dibenarkan untuk menerima pakai kedudukan yang tidak konsisten. Lebih-lebih lagi, di bawah perjanjian jaminan korporat dan indemniti, D2 memikul obligasi yang melampaui obligasi seorang penjamin semata-mata, dengan berkesan memikul peranan sebagai penghutang utama. Oleh itu, plaintif telah membuktikan dengan secukupnya liabiliti kedua-dua D1 dan D2 (lihat perenggan 22–23, 26, 29–30 & 34).

(2) Perjanjian-perjanjian itu adalah jelas berhubung dengan caj yang akan dikenakan. D1 diberikan peluang yang mencukupi untuk meneliti terma-terma perjanjian atau untuk mendapatkan nasihat guaman atau Syariah bebas, seperti yang telah dijamin secara nyata di bawah klausa 60 perjanjian kemudahan. Adalah tidak munasabah sama sekali bagi D1, setelah menggunakan sepenuhnya pembiayaan, memperoleh manfaat besar daripadanya, dan selanjutnya menikmati pengaturan penstrukturan semula yang disediakan oleh SLO1 dan SLO2, untuk kini mencabar kesahihan perjanjian-perjanjian yang memberikan mereka kelebihan ini. Perjanjian kemudahan itu mengandungi klausa bukti muktamad dan defendan telah gagal mengenal pasti sebarang kesilapan yang ketara, jelas atau nyata dalam sijil tersebut. Penggunaan perkataan klausa 1.1 perjanjian kemudahan itu menjadikannya jelas bahawa plaintif tidak mempunyai obligasi untuk memaklumkan kepada defendan tentang Kos Dana Islam (COF-i) khusus yang sedang digunakan. Oleh itu, defendan telah gagal menunjukkan sebarang kesilapan yang ketara dalam sijil keberhutangan. Akibatnya, kuantum tuntutan adalah muktamad, dan plaintif berhak untuk mendapatkan semula jumlah tertunggak seperti yang dinyatakan dalam pliding mereka (lihat perenggan 38, 43, 46, 56 & 59–60).]

Cases referred to

Amey Birmingham Highways Ltd v Birmingham City Council [2018] EWCA Civ 264, CA (refd)

Andrew Lee Siew Ling v United Overseas Bank (M) Bhd [2013] 1 MLJ 449, FC (refd)

Bache & Co (London) Ltd v Banque Vernes et Commerciale de Paris SA [1973] 2 Lloyd's Rep 437, CA (refd)

A *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Sdn Bhd* [1995] 3 MLJ 331, FC (refd)
Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor [2006] 2 MLJ 685; [2006] 3 CLJ 544, FC (refd)
Citibank NA v Ooi Boon Leong & Ors [1981] 1 MLJ 282, FC (refd)
B *Dato' Low Mong Hua v Banting Hock Hin Estate Co Sdn Bhd & Others* [2003] MLJU 449, HC (folld)
Dobbs v National Bank of Australasia (1953) 53 CLR 643, HC (refd)
Flowgroup plc (in liquidation) v Co-Operative Energy Ltd [2021] EWHC 344 (Comm), QBD (refd)
C *HSBC Bank Malaysia Bhd (formerly known as Hong Kong Bank Malaysia Bhd) v LH Timber Products Sdn Bhd (formerly known as Ho Lim Sawmill Sdn Bhd) & Ors* [2005] 6 MLJ 625, HC (refd)
OCBC Bank (M) Bhd v Belton Springs Industries Sdn Bhd & Anor [2005] 7 MLJ 289, HC (refd)
D *Public Bank Berhad v Fu Poh Trading Sdn Bhd & Others* [2004] MLJU 133, HC (refd)

Legislation referred to

E Civil Law Act 1956 s 11
Contracts Act 1950 ss 77, 78, 86, 88
Evidence Act 1950 s 115

Mohd Munzeer bin Zainul Abidin (Mohammad Zaid bin Daud @ Daud Yatimee and Muhammad Ali Redha bin Ahmad Rashidi with him) (Yusfarizal Aziz & Zaid) for the plaintiff.
F *Edward Kuruvilla (Rosanne Ignatius Layola with him) (Kuruvilla Yeoh & Benjamin) for the defendant.*

Yusrin Faidz JC:

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INTRODUCTION

[1] This is the decision of the court upon the conclusion of the full trial of the matter. The plaintiff, Export-Import Bank of Malaysia Bhd, filed this suit
H against the defendants, Impiana Seminyak (Labuan) Co Ltd ('D1') and Impiana Sdn Bhd ('D2'), for the recovery of outstanding sums under an Islamic financing facility agreement ('the facility agreement') and related agreements. The plaintiff claims that the defendants breached the terms of the facility agreement and that the sum of USD3,590,213.17 is due and payable
I together with *ta'widh* and costs. The defendants contend that the plaintiff's claim is premature due to an alleged moratorium granted by the plaintiff, and further argue that the penalty chargers imposed by the plaintiff are exorbitant and unreasonable. After thoroughly reviewing the evidence, I conclude that the plaintiff has successfully demonstrated their case against the defendants on the

balance of probabilities. Accordingly, this is my judgment.

BACKGROUND FACTS

[2] The material facts of this case are largely uncontested, with the trial lasting only a single day and featuring testimony from two witnesses on behalf of the plaintiff and one for the defendants.

[3] Vide a letter of offer dated 24 July 2017, the plaintiff granted D1 an islamic financing facility under the overseas investment financing-i ('OIF-i') facility, comprising two facilities: OIF-i 1 facility (USD3.5m) and OIF-i 2 facility (USD500,000). The purpose of the OIF-i 1 facility was to part-finance the acquisition, renovation, and refurbishment of 21 villas at The Villas Bali Resort & Spa in Seminyak, Bali, Indonesia, while the OIF-i 2 facility was for general working capital.

[4] The facility agreement was executed on 15 December 2017, and D2, as the guarantor, entered into a corporate guarantee and indemnity agreement dated 8 January 2018. The facility agreement provided for quarterly payments of principal and profit, with a grace period for the first 12 months. The facility which was based on the *Tawarruq* (commodity Murabahah) concept was fully disbursed by February 2018. The plaintiff's sale prices were USD5,693,599.98 for OIF-i 1 and USD 792,599.68 for OIF-i 2, which were based on the ceiling rate of 12%pa. Notwithstanding that, the actual instalment of the plaintiff's sale price would be based on the prevailing Murabahah profit rate calculated at 2.5%pa plus the applicable Islamic cost of funds ('COF-i').

[5] In 2020, due to the COVID-19 pandemic, D1 requested a moratorium on the repayment of the facility. The plaintiff granted the moratorium through supplementary letters of offer dated 8 December 2020 ('SLO1') and 5 February 2021 ('SLO2'), which deferred the payment of principal and profit for a specified period. However, SLO1 and SLO2 also imposed additional conditions, including the requirement for D1 to maintain a financial service reserve account ('FSRA'), execute additional security documents, and maintain insurance coverage over the project.

[6] D1 failed to comply with these conditions. As a result, the plaintiff issued a notice to remedy dated 9 November 2021, demanding that D1 remedy the breaches within 30 days. When D1 failed to do so, the plaintiff issued a notice of recall and termination dated 20 December 2021, terminating the facility and demanding payment of the outstanding sum of USD3,590,213.17.

[7] On 28 January 2022, the plaintiff commenced legal proceedings against the defendants, seeking the following reliefs:

(a) the defendants jointly and severally pay the amount of USD3,590,213.17 as at 15 December 2021;

(b) the defendants jointly and severally pay late payment compensation ('*ta'widh*') on the sum of USD3,590,213.17 at a rate of 1%pa on the outstanding installment amount, starting from 16 December 2021 until the maturity period;

(c) the defendants jointly and severally pay late payment compensation ('*ta'widh*') on the amount of USD3,590,213.17 at the Islamic interbank money market (IIMM) rate pa or at the rate determined by Bank Negara Malaysia on the total outstanding amount, starting from the maturity period until full settlement;

(d) the defendants, jointly and severally, shall pay the costs of this action; and

(e) any and/or other reliefs that the court deems just and appropriate.

[8] On 13 November 2024, after the conclusion of the full trial and upon considering the parties' respective submissions, I allowed the plaintiff's claim and ordered that the sum of USD3,590,213.17 (equivalent to RM15,904,644.34 at the rate of RM4.43 per USD1) be paid by the defendants to the plaintiff together with the applicable *ta'widh* and costs of RM30,000.

[9] Essentially, the defendants vide notice of appeal dated 18 November 2024 is appealing against my entire decision.

ISSUES

[10] The following issues arise for determination in this case:

(a) whether, and under what circumstances, the defendants are liable to the plaintiff ('liability'); and

(b) the extent of damages in terms of outstanding principal amount, profit charges, and *ta'widh* that ought to be awarded to the plaintiff by this court ('damages').

LIABILITY

Counsels' contentions on the issue of liability

[11] Learned counsel for the defendants, Edward Kuruvilla, argues that the plaintiffs claim is premature. To elaborate on this issue, the defendants buttress their argument by stating that the plaintiff granted D1 a moratorium from 14 November 2020 to 31 December 2021 and a grace period throughout 2022, during which the payment of the principal sum was deferred, as per the

SLO2. This agreement was effective from 14 December 2020, pending the execution, perfection, and registration of additional security.

[12] It is argued that due to the impact of COVID-19, D1's tourism business and financial standing were severely affected by the COVID-19 pandemic, lockdowns, and the prohibition of tourism in Indonesia and Malaysia. As a result, from April 2021 to January 2022, D1 repeatedly appealed to the plaintiff for a moratorium on the requirement of the FSRA top-up under the terms of SLO2. It is argued that the plaintiff did not communicate any decision on this matter, and that the plaintiff is estopped from declaring any events of default during this period, as the parties were in negotiations to vary the terms.

[13] The effect of COVID-19 is also blamed for D1's inability to execute supplemental security agreement and the negative pledge as they could not pay the professional fees for two solicitors' firms engaged by the plaintiff for this purpose. D1 contends that it had no strict obligation to advance these costs under the SLO2 and the facility agreement, given its declining financial situation. It is contended that the liability of D2 is secondary to that of D1, and as such, the premature claim asserted against D1 implies that the plaintiff's cause of action against D2 has not yet crystallised.

[14] Learned counsel for the plaintiff, Mohd Munzeer bin Zainul Abidin, submits that the defendants' line of defense is devoid of merit and untenable. In respect of the failure to comply with the stipulated conditions, the plaintiff asserts that such failure pertains specifically to D1's obligation to furnish additional security — an essential condition precedent — the breach of which entitles the plaintiff to terminate the agreement. Furthermore, the plaintiff underscores that this obligation remains unaltered, as any variation to the terms of the facility agreement must be duly documented in writing, in strict accordance with its provisions.

[15] Counsel for the plaintiff further contends that the defendants' claim that they were unable to execute additional securities due to unpaid professional fees to solicitors is refuted by the testimony of DW1, who admitted that the failure to execute the documents was not due to unpaid fees but rather because the defendants' legal department had not given clearance to proceed.

Court's findings on the issue of liability

[16] The defendants' primary contention on the issue of liability revolves around two key arguments:

(a) that the plaintiffs claim is premature because no event of default

occurred, and the parties were in the midst of negotiating a moratorium on the FSRA payments; and

(b) that the defendants were unable to execute additional security documents due to unpaid professional fees to solicitors.

[17] At the very threshold of this matter, it is abundantly clear that the plaintiffs right to review and restructure the facility in question is expressly provided for under cl 2.5 of the facility agreement, a prerogative vested solely in the plaintiff's discretion. Furthermore, a harmonious reading of cll 14 and 25, together with Items A(7) and B(10) within Schedule 2 of the facility agreement, unequivocally affirms the plaintiffs entitlement to demand, at any time, that D1 furnish such additional security as the plaintiff may deem necessary.

[18] Based on SLO1, in consideration of granting the required moratorium, the following additional securities were required:

> In addition, EXIM Bank has also imposed the following *additional security where the security documents to be executed 6 months from the date of acceptance of this Supplemental Letter of Offer*:
>
> (a) Third party Second Legal Charge or its equivalent under Indonesian law over The Impiana Private Villas Ubud;
>
> (b) A Negative Pledge by the Customer; where as long as there is outstanding under the Facility, the Customer shall not incur/create the following:
>
> i. New indebtedness; and
>
> ii. Charge or encumbrances against its assets.
>
> (c) Additional Finance Service Reserve Account ('FSRA') equivalent to one (1) quarterly installment to be built up through a sinking fund making a total of new minimum FSRA level to two (2) quarterly principal and profit instalment.
>
> Please take note, all the terms and conditions of the Supplemental Letter of Offer shall take effect from the date of the acceptance of this Supplemental Letter of Offer pending execution, perfection, and registration (if applicable) of the additional security. (Emphasis added.)

[19] Whereas SLO2 amends the condition of FSRA in para (c) of SLO1 to the following:

> New Deed of Assignment and/or Charge over Finance Service Reserve Account ('FSRA') under the arrangement as follows:-
>
> (i) The Customer shall establish the FSRA with a commercial bank acceptance by EXIM Bank and EXIM Bank shall be the sole signatory of the FSRA.

(ii) The Customer shall replenish into the FSRA an amount equivalent to One (1) Quarter Instalment (Cost and Profit) ('Minimum FSRA Level) that shall be built-up monthly over a period of 24 months on equal amount basis commencing from 28 February 2021 and must be completed before 31 January 2023.

(iii) Any profit deriving from placement of the monies in the FSRA shall belong to EXIM Bank. EXIM Bank at its own discretion, may place the profit in the FSRA as part of the security for payment of the Islamic Facilities.

(iv) The Customer shall at all times maintain the Minimum FSRA until full settlement of the Islamic Facilities. In the event the amount in the FSRA is less than Minimum FSRA Level, the Customer is required to replenish the differential amount within thirty (30) days from date of EXIM Bank's notice.

(v) Unless otherwise consented by EXIM Bank, the monies in the FSRA shall be only utilised for the payment of all monies due and payable under the Islamic Facilities (including the Cost and Profit).

This SLO2 shall form an integral part and shall be read together with the Facility Agreement, SLO1 and the existing security documents. Save and except for the changes pursuant to the terms and conditions as stated in this SLO2, all other terms and conditions in the Facility Agreement and the existing security documents shall remain unchanged and be in full force and effect.

[20] By virtue of the notice of demand dated 9 November 2021, it is manifestly clear that D1 was required to remedy the breach by undertaking the following actions, each to be completed within a period of 30 days:

(a) rectifying the failure to comply with the FSRA requirement stipulated in the SLO by remitting the sum of USD67,424, being the total FSFRA amount payable to EXIM Bank as of 31 October 2021;

(b) executing the additional security documents as mandated in the SLO within six months from the date of acceptance of SLO1, a period which lapsed on 14 June 2021; and

(c) ensuring the maintenance of valid *takaful* or insurance coverage over the project.

[21] The obligations imposed upon D1 under the notice are clear and unequivocal, with their fulfillment being imperative within the stipulated timeframe. D1's failure to comply with these obligations constituted an event of default pursuant to cl 17.1(c) of the facility agreement, thereby entitling the plaintiff to exercise its contractual rights, including the termination of the facility, as duly conveyed in the plaintiff's solicitors' notice of termination dated 20 December 2021.

[22] Upon careful consideration of the facts, I am of the view that the moratorium granted under SLO1 and SLO2 was expressly limited to the deferral of payments in respect of principal and profit. It did not, however, operate to suspend D1's obligations under the FSRA, nor did it absolve D1 from executing the additional security documents or maintaining insurance coverage. These obligations remain binding, as they are firmly anchored in the facility agreement and further reinforced by the additional securities required pursuant to SLO1 and SLO2.

[23] The evidence presented during the trial, including the testimony of the defendants' own witness ('DW1'), confirms that D1 was fully aware of its obligations under SLO1 and SLO2. DW1 admitted that no FSRA payments were made, and no additional security documents were executed. This admission corroborates the plaintiff's assertion that D1 was in continuous breach of the terms of the facility agreement.

[24] The defendants' argument that the plaintiff agreed to suspend the FSRA obligations is not supported by the evidence. It is clear that in order for the terms to be amended, it has to be made in writing pursuant to cl 44(i) and cl 59 which states as follows:

> 44. RIGHTS CUMULATIVE, WAIVERS
>
> (i) The rights of EXIM Bank under this Agreement are cumulative, may be exercised as often as EXIM Bank consider it reasonably appropriate and are in addition to the Bank's other rights under any applicable law. The rights of EXIM Bank in relation to the Facility (whether arising *under this Agreement or under any applicable law) shall not be capable of being waived or varied otherwise than by an express waiver or variation in writing*.
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> ...
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> 59. VARIATION OF TERMS
>
> It is hereby expressly agreed and declared by the Customer that, subject to this Agreement EXIM Bank shall be entitled:-
>
> (i) if there is no occurrence of an Event of Default, at any time from time to time *Exim Bank may vary or amend the terms of this Agreement by serving notice in writing* of such its intention and such provisions and terms so varied or amended shall be enforced from the date specified in the said notice; or
>
> (ii) upon the occurrence of an Event of Default which is subsisting to vary and amend the terms of this Agreement at absolute discretion of EXIM Bank with notice to the Customer, by means of an exchange of letters and thereupon such amendments and variations shall be deemed to become effective and the relevant provisions of this Agreement shall be deemed to have been amended or varied accordingly and shall be read and construed as if such amendments and variations had been incorporated in and had formed part of this instrument at the time of execution hereof.

[25] In *Dato' Low Mong Hua v Banting Hock Hin Estate Co Sdn Bhd & Others* [2003] MLJU 449 (HC) per Ramly Hj Ali J, the High Court held that negotiations do not confer any legal rights unless formalised in writing:

> The proposal to de-merge BHH is very much in its infancy and completely uncertain as to his terms. No proposal has been put to all shareholders of BHH. Any proposal to de-merge BHH should not confined to the main shareholders only. Other shareholders have a right to know as they will obviously be affected by any de-merger. The parties are not in a position to decide on the issue of de-merger until a transparent management is in place to evaluate the business and affairs of BHH. No terms of this proposed demerger have yet to be discussed and agreed upon. There is no agreement or understanding between all the shareholders and the petitioner that there should be a de-merger.
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> *This court will not impose any legitimate expectation when parties are merely in negotiation and no agreement has been concluded*. Illustrative is the House of Lords decision in *O'Neill and another v Phillips and others, Re a company (No 00709 of 1992)* [1999] 2 BCLC 1, where the petitioner was seeking a legitimate expectation to shares. In that case Lord Hoffman said:
>
> > ... Mr. Phillips had agreed in principle, subject to the execution of a suitable document But where I think that the Court of Appeal may have been misled is by the expression 'legitimate expectation'. The real question is whether in fairness or equity Mr. O'Neill had a right to the shares. On this point ... Mr. Phillips never agreed to give them. He made no promise on that point. From which it seems to me to follow that is no basis, consistent with established principles of equity, for a Court to hold that Mr. Phillips was behaving unfairly in withdrawing from the negotiation. This would not be restraining the exercise of rights. It would be imposing upon Mr. Phillips an obligation to which he never agreed. *Where, as here, enter into negotiations with a view to a transfer of shares on professional advice and subject to a condition that they are not to be bound until a formal document has been executed, I do not think it is possible to say that an obligation has arisen in fairness or equity at an earlier stage.*
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> *There is no 'agreement' to de-merge BHH as suggested by the petitioner. At best, there exists a 'proposal' to de-merge — not an 'agreement'. Parties are still at the stage of negotiation. Mere negotiations do not confer rights. The law does not recognise a contract to negotiate and where fundamental matters were left to be the subject of negotiation there was no contract* (see: *Courtney & Fairbairn Ltd v Tolaini Brothers; (Hotels) Ltd and another* [1975] 1 WLR 297; and *Lim Hong Liang & Anor v Tan Kim Lan @ Tan Kim Leng & Anor* [1997] 5 MLJ 157). (Emphasis added.)

[26] Applying these principles to the present case, it is evident that no written variation to the relevant obligations was ever issued. Furthermore, the plaintiff has consistently and unequivocally demanded compliance with the FSRA requirements. The defendants' assertion that they were engaged in negotiations for a waiver remains, at best, a mere exchange of discussions, which in law does not crystallise into a binding agreement capable of altering their contractual obligations.

[27] In the event of any delay in the exercise of its rights, I am of the considered view that cl 23 of the facility agreement provides a safeguard to the plaintiff, ensuring that such delay does not, in law, constitute a waiver of its contractual entitlements. This clause reinforces the well-established principle that mere inaction or indulgence on the part of a creditor does not amount to a relinquishment of its rights, nor does it preclude the subsequent enforcement of those rights in full. The cumulative nature of these rights and remedies, as expressly preserved by cl 23, ensures that the plaintiff is not estopped from enforcing its claims, even if it had previously exercised restraint or granted indulgence to the defendants. I reproduce the said clause herein for ease of reference:

> 23. WAIVERS, MODIFICATIONS AND INDULGENCE / REVIEW OF THE FACILITY
>
> No neglect, failure or delay by EXIM Bank in exercising any right, power or privilege hereunder or under the relevant Transaction Document(s) and/or the relevant Security Documents shall operate as a waiver thereof nor shall any single partial exercise of any right, power or privilege preclude any further exercise thereof or the exercise of any other right, power or privilege. The rights and remedies herein and in the relevant Transaction Document(s) and/or the relevant Security Documents provided are cumulative and not exclusive of any rights and remedies provided by law and in equity.

[28] Regarding the defendants' contention that SLO1 and SLO2 lack explicit terms specifying which party is responsible for covering the legal fees associated with the additional security, I hold the considered opinion that SLO1 and SLO2 must be interpreted in conjunction with the provisions of the facility agreement. Specifically, cll 30 and 40 of the facility agreement unequivocally establish that this obligation rests with D1.

[29] As to the liability of D2 as the corporate guarantor, the restructuring terms in SLO1 and SLO2 have been consented by D2 which is evidenced by D2's signatures on both documents. Therefore, by virtue of ss 86 and 88 of the Contracts Act 1950, such consent binds D2 to the terms of SLO1 and SLO2. In this context, I am of the considered view that D2 cannot be permitted to adopt inconsistent positions. Having knowingly accepted the benefits of the restructuring — namely, affording their sister company, D1, the opportunity to better manage its financial obligations — they are estopped from challenging the validity or binding effect of the restructuring arrangements upon them (see: *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Sdn Bhd* [1995] 3 MLJ 331 (FC) and s 115 of the Evidence Act 1950).

[30] Moreover, under the corporate guarantee and indemnity agreement, D2 assumed obligations that surpassed those of a mere surety, effectively taking on the role of a principal debtor. In this capacity, D2 unconditionally

guaranteed to the plaintiff the payment, on demand, of all sums of money due and payable by D1 under the facility. This obligation is further reinforced by cl 2.1 of the corporate guarantee and indemnity agreement, which provides as follows:

> 2.1 Covenant to pay
>
> In consideration of EXIM Bank granting at the request of the Customer and of the Corporate Guarantor to grant the Facility to the Customer, the Corporate Guarantor hereby unconditionally and irrevocably guarantee as a continuing obligation, to EXIM Bank *as principal debtors and not merely as sureties,* on demand the payment by the Customer of the Secured Amount to EXIM Bank and the due performance of the obligations of the Customer under the Facility Agreement and upon the terms and conditions herein contained.
>
> Notwithstanding the above, the Corporate Guarantee hereby unconditionally and irrevocably guarantee as a continuing obligation, to EXIM Bank on demand to pay any shortfall for the payment of Secured Amount and other monies payable thereon under the Facility. (Emphasis added.)

[31] The Federal Court in the case of *Andrew Lee Siew Ling v United Overseas Bank (M) Bhd* [2013] 1 MLJ 449 (FC) held that the effect of a principal debtor clause means the principal debtor is primarily liable or the principal borrower's indebtedness to a lender and as such a liability is not dependent or secondary to the liability of the principal borrower.

[32] I further observe that cl 11.3 of the corporate guarantee and indemnity agreement unequivocally establishes the nature of the guarantee, rendering it, in effect, a contract of indemnity within the meaning of ss 77 and 78 of the Contracts Act 1950:

> 11.3 Indemnity
>
> The Corporate Guarantor hereby further agrees, undertakes, confirms and covenants with EXIM Bank that, without derogation from any of the Corporate Guarantor's obligations to EXIM Bank provided in this Guarantee Agreement, the Corporate Guarantor hereby further agrees and undertakes with EXIM *Bank to indemnify EXIM Bank and keep indemnified EXIM Bank against all losses, actions, proceedings, claims, demand, cost, damages and expenses* (including legal costs on a full indemnity basis) which EXIM Bank may incur, suffer or sustain by reason of any breach by the Customer of such covenants, conditions or stipulations contained in each the Facility Agreement and other Security Documents. (Emphasis added.)

[33] Section 77 of the Contracts Act 1950 defines indemnity as a promise to hold another harmless from loss arising out of a transaction or resulting from the conduct of another. Such a clause offers greater protection to the plaintiff in the event of D1's default, as it imposes liabilities that are more difficult to displace than those arising under a guarantee. Unlike guarantees, indemnity clauses survive the termination or material variation of the underlying contract.

Based on s 78 of the Contracts Act 1950, they also provide broader compensation than damages, as they are not necessarily subject to the principle of co-extensiveness, which limits a guarantor's liability to the scope of the principal debtor's obligations.

[34] In light of the foregoing, I find that the plaintiff has sufficiently established the liability of both D1 and D2. D1's failure to comply with the FSRA requirements, execute additional security documents, and maintain valid insurance coverage constitutes a clear breach of the facility agreement, as reinforced by the terms of SLO1 and SLO2. The defendants' arguments regarding the suspension of obligations or ongoing negotiations are untenable, as no written variation or waiver was ever formalised, and negotiations alone do not confer legal rights. Furthermore, D2, as the corporate guarantor and principal debtor, is bound by the terms of the corporate guarantee and indemnity agreement, which unequivocally holds D2 liable for the obligations of D1.

QUANTUM

Counsels' contentions on the issue of quantum

[35] On the issue of quantum, the learned counsel for the defendant argues that the 'interest' claimed by the plaintiff during the moratorium period ie USD186,445.56 for OIF-I 1 and USD24,181.26 for OIF-I 2 are exorbitant and unreasonable because it was charged without the defendants' knowledge or consent, and that the said interest rate contravenes s 11 of the Civil Law Act 1956 and in accordance with the agreements between the parties.

[36] The learned counsel for the plaintiff on the other hand dismisses the defendants' allegation that the claim is exorbitant and unreasonable, noting that the defendants never disputed the amount claimed prior to the suit. The plaintiff concludes that the defendants have no real defence and that their allegations are mere afterthoughts, lacking any substantive evidence to support their claims. Therefore, the plaintiff argues that the court should allow the plaintiff's claim, as the defendants are conclusively bound by the certificate of indebtedness and have failed to demonstrate any manifest error in the plaintiff's calculations or claims.

Court's findings on the issue of quantum

[37] The learned counsel for the defendants did not dispute the issuance of the notice to remedy the breach dated 9 November 2021, nor the notice of recall and termination dated 20 December 2021. However, they contend that the rates imposed by the plaintiff under the facility are excessive. While the

term 'interest' was invoked in their defence and submissions, upon careful examination, I find no evidence of any conventional interest being levied. Instead, the charges in question consist solely of Murabahah profit rate and *ta'widh,* both of which are fully consistent with and sanctioned by the principles of Shariah governing the facility in question.

[38] In my view, the agreements are unequivocal with respect to the charges to be imposed. Clause 10 of the letter of offer allows the plaintiff to impose profit rate at the plaintiff's Islamic cost of fund ('COF-i') plus margin of 2.5%pa. It is agreed that plaintiff's COF-i which is its funding cost shall be based on the London interbank offered rate ('LIBOR') or any other rate that is to be determined by the plaintiff at its absolute discretion, plus cost of funding. Based on cll 11 and 12 of the facilities agreement, read together with Schedule 3, this figure translated to the prevailing profit charges of 5.59%pa which is capped at a ceiling rate of 12%pa.

[39] Clause 10.2 of the facility agreement authorises the plaintiff to debit D1's account with any notice in respect of 'any cost, charges, fees, expenses, or other moneys'. Such charges include, but not limited to insurance paid, quit rent and assessment, fee, price value and/or revenue in a taxable supply to which GST would apply.

[40] Whilst cl 13.1 of the facility agreement entitles the plaintiff to *ta'widh* at the rate of 1% on overdue amounts during the tenure of the facilities, and a further *ta'widh* not exceeding the daily weighted average overnight rate for Mudharabah interbank investments quoted in Malaysia's Islamic interbank money market ('IIMM-rate') on the outstanding financing amount after the expiry of the financing tenure.

[41] In *Public Bank Berhad v Fu Poh Trading Sdn Bhd & Others* [2004] MLJU 133 (HC), the court dismissed the defendants' contention that the interest charged was excessive, given that they had expressly agreed to terms allowing for such variations. The court held that merely asserting errors in calculation, without providing specific details, was insufficient to challenge the certificate of indebtedness.

[42] Similarly, in *HSBC Bank Malaysia Bhd (formerly known as Hong Kong Bank Malaysia Bhd) v LH Timber Products Sdn Bhd (formerly known as Ho Lim Sawmill Sdn Bhd) & Ors* [2005] 6 MLJ 625 (HC), it was held that the plaintiff is well within its rights to impose the charges as per the agreement entered into by the parties.

[43] In any event, I am firmly of the considered view that D1 was afforded ample opportunity to scrutinise the terms of the agreements or to seek

independent legal or *Shariah* counsel, as they had expressly warranted under cl 60 of the facility agreement. Yet, it was only upon the commencement of these proceedings that they elected to voice their objections. It is wholly untenable for D1, having fully utilised the financing, derived substantial benefits therefrom, and further enjoyed the restructuring arrangement facilitated by SLO1 and SLO2, to now challenge the validity of the very agreements that granted them these advantages.

[44] On the issue of correctness of the amount claimed, the defendant simply produces LIBOR chart which accounts the movement of LIBOR from 1 January 2018 (about 1.7%) till 31 December 2022 (about 4.7%). Wherein they argue that LIBOR rates are much lower than those charged by the plaintiff. In particular, the certificate of indebtedness was not based on LIBOR and therefore wrongly calculated. The defendants rely on the case of *OCBC Bank (M) Bhd v Belton Springs Industries Sdn Bhd & Anor* [2005] 7 MLJ 289 (HC) which held that 'even though the plaintiff has discretion to vary the rates, that discretion must be subject to reasonableness of the increase base on commercial banking practice, a term which must necessarily be implied into contract'.

[45] The plaintiff on the other hand argues for the application of conclusive evidence clause within the facility agreement as well as the corporate guarantee and indemnity agreement. It is argued that proof of quantum has been agreed to be based on a certificate of indebtedness as at 9 February 2024 (see pp 30–31 of encl 53), which in absence of manifest error would be deemed conclusive evidence of the amount stated to be due.

[46] On this issue of quantification of sum due, I find that the facility agreement contain conclusive evidence clause. This can be seen in cll 10.1 and 43 of the facility agreement as well as cl 11.7 of the corporate guarantee and indemnity agreement which states the following:

> 10. EXIM BANK CERTIFICATION
>
> 10.1 *The certificate of EXIM Bank certified by any officer,* as to what at any time are the appropriate amounts of the Secured Amount our any other costs, charges, expenses or other money payable hereunder by the Customer or other money chargeable and/or the manner of calculation and/or the time for payment thereof *shall be final and conclusive and binding on the Customer and shall not, in the absence of manifest error, be questioned on any account whatsoever*.
>
> 43. EVIDENCE OF SECURED AMOUNT
>
> *A statement of account in writing stating the amount payable* by the Customer under the Facility and/or under the Transaction Documents and indication as to how such amount has been calculated and duly certified by any authorised officer of EXIM Bank *shall in the absence of manifest error be conclusive evidence that such amount is in fact due and payable* by the Customer including for the purpose of legal proceedings.

11.7 Conclusiveness of statement of account

It is hereby agreed that a statement *of account in writing showing the Secured Amount of the Customer to EXIM Bank duly certified by an authorised officer of EXIM Bank shall be binding and conclusive against the Corporate Guarantor save and except for any manifest error.* (Emphasis added.)

[47] Conclusive evidence clauses operate to establish that a determination of the amount owed by a debtor is, for all intents and purposes, final and binding as to the sum payable. Such provisions effectively preclude the need for protracted inquiries into the precise calculation of outstanding debts, sparing the parties the necessity of combing through financial records in search of potential discrepancies.

[48] In *Citibank NA v Ooi Boon Leong & Ors* [1981] 1 MLJ 282 (FC) at p 284, the Federal Court held that the indebtedness of the borrower may be ascertained conclusively by such certificate:

In the present case the guarantee contains a clause which enables the bank by producing a certificate of indebtedness by its officer to dispense with legal proof of the actual indebtedness of the respondents. Clause 19 provides thus 'A certificate by an officer of the bank as to the money and liabilities for the time being due or incurred to the bank from or by the customer shall be conclusive evidence in any legal proceedings against us or any one of us or our personal representatives'. *It means that, for the purpose of fixing liability of the respondents, the company's indebtedness may be ascertained conclusively by a certificate*: see *Dobbs v National Bank of Australasia Ltd* (1935) 53 CLR 643; *Bache & Co (London) Ltd v Banque Vernes et Commerciale de Paris SA* [1973] 2 LLLR 437.

In the circumstances the respondents are bound under clause 19 to accept the certificate of indebtedness duly executed by the Assistant Vice-President of the Branch as conclusive evidence of the debt due to the bank. On this footing the bank would be entitled to judgment as prayed for. (Emphasis added.)

[49] Lord Denning MR in *Bache & Co (London) Ltd v Banque Vernes Et Commerciale De Paris SA* [1973] 2 Lloyd's Rep 437 (CA) had this to say at p 440:

[t]hat, as a matter of principle, the conclusive evidence clause was binding according to its terms and, if notice of default was given in pursuance of the conclusive evidence clause it was binding according to its terms, the clause was not contrary to public policy.

[50] The Federal Court in *Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor* [2006] 2 MLJ 685; [2006] 3 CLJ 544 (FC) through the judgment of Steve Shim CJSS quoted with approval of the case of *Dobbs v National Bank of Australasia* [1953] 53 CLR 643 (HC), where the High Court of Australia made the following observation:

> ... The bank could recover without the production of a certificate if, by ordinary legal evidence, it proved the actual indebtedness of the customer. But the (conclusive evidence) clause, if valid, enables the bank by producing a certificate to dispense with such proof. It means that for the purpose of fixing the liability of a surety, the customer's indebtedness may be ascertained conclusively by a certificate ... But the manifest object of the clause was to provide a ready means of establishing the existence and amount of the guaranteed debt and avoiding an inquiry upon legal evidence into the debits going to make up the indebtedness.

[51] Steve Shim CJSS in *Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor* also held that 'a certificate of indebtedness operates in the field of adjective law. It excuses the plaintiff from adducing proof of debt. Such a certificate shifts the burden onto the defendant to disapprove the amount claimed' (at para 11).

[52] The reference to 'manifest error' nevertheless would allow a comeback if there is a material mistake in the calculations. In the case of *Amey Birmingham Highways Ltd v Birmingham City Council* [2018] EWCA Civ 264 (CA), the English Court of Appeal held as follows:

> 83. Is this a case of manifest error? There are two helpful recent authorities on this issue, namely *IIG Capital LLC v Van Der Merwe* [2008] EWCA Civ 542; [2008] 2 All ER (Comm) 1173 and *North Shore Ventures Ltd v Anstead Holdings Inc* [2011] EWCA Civ 230; [2012] Ch 31.
>
> 84. IIG was a claim for payment against guarantors. The defendants had bound themselves to pay on demand, absent manifest error. Lewison J, the trial judge, rejected the suggestion that there was manifest error. He said that a manifest error was 'one that is obvious or easily demonstrable without extensive investigation'. The Court of Appeal approved the judge's approach to that issue and upheld his decision: see the judgment of Waller LJ at [33] to [35]. Lawrence Collins and Rimer LJJ agreed.
>
> 85. North Shore was an action by a lender against the two guarantors of the loan. Clause 3.4 of the guarantee stated that a certificate signed by the claimant for the amount of the indebtedness was conclusive evidence against the guarantors, unless manifestly incorrect. The Court of Appeal approved the test for manifest error formulated by Lewison J in IIG. The court held that the certificate was invalidated by manifest error, because it did not take into account an agreed variation in the rate of interest.
>
> 86. At [61] Smith LJ said:
>
> > On reflection I have come to the conclusion that for a party to rely on a manifest error in a certificate does not depend upon his ability to demonstrate the error immediately and conclusively. *In the present case, the guarantors were able to recognise immediately that the certificate was based upon the interest rates as set out in the original loan agreement and not as varied in November 2004. They could see that it was manifestly incorrect. They could not immediately demonstrate that conclusively; they could not do so until the court had determined the issue of*

variation. But they were right, as this court has now held. I would hold that the certificate was manifestly incorrect and was of no effect.

87. Finally, in relation to the law, I should refer to *IG Index plc v Colley* [2013] EWHC 478 (QB). In a very thorough judgment Stadlen J reviewed the authorities on manifest error. At [813] to [814] he held that *the court could have regard to extrinsic evidence.*

[53] This principle is reaffirmed in the recent judgment of *Flowgroup plc (in liquidation) v Co-Operative Energy Ltd* [2021] EWHC 344 (Comm) (HC), wherein the English High Court held that for a challenge based on a manifest error clause to succeed, there must be a plain and obvious mistake. However, whether such an error has indeed occurred is a matter of fact, and need not be glaringly apparent from the face of the certificates themselves. In *Flowgroup plc v Co-Operative Energy Ltd* the error in issuing the certificates only came to light once the underlying contractual obligation was properly scrutinised.

[54] Applying these authorities, in determining whether a manifest error exists, one must consider that some errors only reveal themselves once the court has arrived at a particular legal conclusion. While it may not be possible to demonstrate 'immediately and conclusively' that the errors were incorrect at first glance, they may nonetheless still constitute manifest errors.

[55] At all material times, the defendants did not raise any objection to the quantification of the amount due. It was only upon the commencement of this litigation that the defendants asserted the charges were excessive. However, in light of the authorities referenced above, it would be precipitous to dismiss these objections as inherently untruthful. The law affords the defendant the right to thoroughly examine the certificate, ensuring not only the absence of glaring inaccuracies but also that the charges are consistent with the terms and conditions stipulated in the facility agreements.

[56] Upon careful consideration of the evidence adduced, I am of the firm view that the defendants have failed to identify any glaring, plain, or obvious error in the certificate. The sole issue before this court, with respect to the calculation of the outstanding sum, is whether the Murabahah profit rate imposed warrant judicial scrutiny on the grounds of being allegedly excessive. As previously established in this judgment, cl 12 of the facility agreement governs the Murabahah profit rate, which is to be calculated at 2.5% plus COF-i. At the time of the facility agreement's execution, the Murabahah profit rate stood at 5.59%pa. Based on the explanatory section of the certificate of indebtedness (at pp 32 to 38 of encl 53), the plaintiff applied the following Murabahah profit rates:

Monthly Rollover Date		Profit Rate (2.5% + COF-i)
From Date	To Date	
14 May 2020	14 August 2020	1.75350%
14 August 2020	14 November 2020	1.57350%
14 November 2020	31 December 2020	4.91060%
31 December 2020	31 March 2021	4.91060%
31 March 2021	30 June 2021	4.89250%
30 June 2021	30 September 2021	4.86725%
30 September 2021	15 December 2021	4.85000%

[57] I observe that the LIBOR rates were, indeed, historically suppressed during the COVID-19 pandemic, a consequence of both the unprecedented economic disruptions and the extensive interventions by central banks. As the global economy embarked on its path to recovery, LIBOR rates, while remaining at subdued levels, began to exhibit modest upward trends. However, it is pertinent to note that by the end of 2021, LIBOR was formally discontinued for the majority of currencies, marking a significant transition in financial markets toward alternative reference rates such as SOFR in the United States, SONIA in the United Kingdom, and ESTR in the Eurozone. The cessation of LIBOR was ultimately finalised with its last publication on 30 September 2024. Notwithstanding these developments, it is noteworthy that the plaintiff in this matter has expressly reserved its right to elect between applying LIBOR or its own rates, designated as COF-i, as it deems appropriate.

[58] Such reservation can be seen in cl 1.1 of the facility agreement, wherein COF-i is defined as 'Exim Bank's funding cost, which shall either be based on LIBOR or any other rate to be determined by EXIM Bank at its absolute discretion, plus the cost of funding by EXIM Bank'. Consequently, the plaintiff retains the exclusive prerogative to determine whether to utilise LIBOR or its own rate as COF-i in computing the Murabahah Profit Rate. The defendant's insistence that the rate should be fixed solely based on LIBOR is, therefore, without merit.

[59] As to the obligation to inform the changes in profit charges, I am of the considered view that the wording of the clause makes it unequivocally clear that the plaintiff is under no obligation to inform the defendant of the specific COF-i which is being applied. The reference to 'COF-i' is a practical measure that promotes business efficacy, particularly in light of the constant fluctuations. Requiring the plaintiff to notify its customers of each adjustment in real time would be impractical especially if the final figure (2.5% + COF-i) is much lower than the initial Murabahah profit rate of 5.59%pa (prevailing rate during execution of the facility agreement); and much lower than the

permitted ceiling of Murabahah profit rate of 12%pa. In summation, the defendants have failed to demonstrate any manifest error within the certificate of indebtedness. Consequently, the quantum of the claim stands as conclusive, and the plaintiff is rightfully entitled to recover the outstanding sum as set forth in their pleadings.

DECISION

[60] In light of the foregoing findings, I was satisfied that the plaintiff had established its case on the balance of probabilities. Accordingly, I allowed the plaintiff's claim and ordered both defendants to jointly and severally pay the plaintiff the sum of USD3,590,213.17 (equivalent to RM15,904,644.34 at the exchange rate of RM4.43 per USD1), together with the applicable *ta'widh,* as well as costs fixed at RM30,000.

Claim allowed.

Reported by Nabilah Syahida Abdullah Salleh